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No. 930

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

JOSEPH L. SANAPAW,
WILLIAM J. GRIGNON,
FRANCIS BASINA,
Petitioners,

v.

STATE OF WISCONSIN,
Respondent.

PETITIONERS' REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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1. *Power to Abrogate Treaties.*

Respondent (p. 8) refers to the rule that Congress has plenary power to abrogate Indian treaty rights. This we freely concede. The question is whether Congress actually did so by implication, contrary to a rule almost as old as the Republic, that treaty and statutory language affecting Indians should be construed in their favor, and especially not against them by implication.[1]

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[1] See, for example, *Worcester* v. *Georgia*, 31 U.S.(6 Pet.) 515, 582 (1832); *The Kansas Indians*, 72 U.S.(5 Wall.) 737, 760 (1866);

2. *The Race Horse Case.*

Respondent (p. 18) states that continued freedom of the hunting rights from state regulation would be of doubtful constitutionality, citing *Ward* v. *Race Horse.*[2]

In the first place, *Race Horse* involved a hunting right exercised on public land 100 miles away from the Indian's reservation,[3] while the instant right was exercised within the Indians' own reservation (or former reservation if one prefers—in any event the land belongs to the Indians, not to the State or anyone else).

In the second place, *Race Horse* involved a hunting right which this Court said the parties intended to be "temporary and precarious."[4] It is inconceivable that the

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Choctaw Nation v. *United States*, 119 U.S. 1, 27-28 (1886). *Jones* v. *Meehan*, 175 U.S. 1, 11 (1899); *United States* v. *Winans*, 198 U.S. 371, 380 (1905); *Choate* v. *Trapp*, 224 U.S. 665, 675 (1912); *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78, 89 (1918); *Seufert Bros. Co.* v. *United States*, 249 U.S. 194, 198 (1919); *Carpenter* v. *Shaw*, 280 U.S. 363, 367 (1930); *Squire* v. *Capoeman*, 351 U.S. 1, 7 (1956).

The Internal Revenue Act sweepingly imposes a tax on the net income of "every individual" derived "from any source whatever." Nevertheless, because of the rule of favorable construction where the Indians are concerned, this Court has held that the tax does not apply to income from Indian trust property, despite the absence of any express tax exemption. *Squire* v. *Capoeman*, 351 U.S. 1 (1956).

For cases of this Court applying the rule to Indian fishing rights, see *U.S.* v. *Winans*, 198 U.S. 371 (1905); *Seufert Bros. Co.* v. *United States*, 249 U.S. 194 (1919). See also *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78 (1918), where this Court upheld exclusive Indian fishing rights in ocean waters surrounding an Indian reservation, though the grant of the reservation had been silent about any such rights in the surrounding waters.

[2] 163 U.S. 504 (1896), reversing 70 Fed. 598 (D. Wyo.).

This was the first case to reach this Court on Indian hunting and fishing rights.

[3] Id. at 506.

[4] Id. at 515. This is a dubious finding, and a state supreme court in a probably indistinguishable case has taken the contrary view. *State* v. *Arthur*, 74 Ida. 251, 261 P.2d 135 (1953), cert. den. 347

parties in the instant case ever intended the Menominee hunting right to be "temporary and precarious." The Menominee Indians have owned this right since time immemorial, and the 1854 treaty which confirmed their reservation made no mention of an expiration date or event. The Indians have and still need this right today, and seek to exercise it only on their own land.

In the third place, the underlying attitude against Indian hunting and fishing rights evident in *Race Horse* was later neutralized by the opposite attitude in *United States* v. *Winans*.[5] In the latter case, this Court noted that the treaty was not a grant of rights to the Indians, but a grant of rights *from* them, and a reservation of those (including fishing rights) not granted.[6] And such was the effect of the Menominee treaty of 1848, as amended by the treaty of 1854—the Menominees gave up all they owned outside of the Wolf River reservation, but retained all their rights undiminished within the reservation. If the Yakima fishing rights in *Winans* survived *outside* the Yakima reservation, so should the Menominee hunting rights survive *within* their reservation.[7]

Finally, *Race Horse* has been modified, if it ever meant that the admission of a state ipso facto cancels off-reser-

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U.S. 937. The *Arthur* case, in a closely reasoned and scholarly analysis, concluded that later decisions of this Court had substantially modified *Race Horse*.

[5] 198 U.S. 371 (1905). *Race Horse* involved interference with the rights by state action. *Winans* involved interference by private action. Both involved rights outside the reservation.

[6] 198 U.S. at 381.

[7] *Winans*. upheld the fishing right outside the reservation but within the ceded area. In *Seufert Bros. Co.* v. *United States*, 249 U.S. 194 (1919); this Court went even further and upheld the fishing right even outside the ceded area.

vation treaty hunting rights. In *Winans*[8] and *Seufert*[9] this Court rejected that broad interpretation and held that the rights do survive, at least as against *private* interference. In *Tulee*[10] this Court held that the rights survived to the extent of being exempt from state licensing fees, and indicated that the state could only regulate the time and manner of fishing, and only to the extent necessary for conservation.[11] Where the state is unable to clearly prove that particular regulations are actually necessary for conservation, the Indian treaty rights are not subject to them.[12] All of which shows that Indian hunting and fishing rights, even outside the reservation, do carry advantages not enjoyed by non-Indians, as against both state and private interference, and that the constitutionality of these advantages has not been doubtful. *Within* the reservation, at least one which is still supervised by the federal government, state hunting restrictions unquestionably do not apply.[13] Even where the federal government has relinquished its law and order supervision over a reservation pursuant to Public Law 280, state hunting restrictions do not apply to Indian treaty hunting rights.[14]

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[8] *United States* v. *Winans*, 198 U.S. 371 (1905).

[9] *Seufert Bros. Co.* v. *United States*, 249 U.S. 194 (1919).

[10] *Tulee* v. *Washington*, 315 U.S. 681 (1942).

[11] Id. at p. 684.

[12] *Makah Tribe* v. *Schoettler*, 192 F.2d 224 (9th Cir. 1951); *Maison* v. *Confederated Umatilla Tribes*, 314 F.2d 169 (9th Cir. 1963), cert. den. 375 U.S. 829.

[13] E.g., *Moore* v. *United States*, 157 F.2d 760 (9th Cir. 1946), cert. den. 330 U.S. 827; *State* v. *Sanapaw* below.

[14] See the express saving clause in Public Law 280, 18 U.S.C. § 1162: "Nothing in this section . . . shall deprive any Indian or any Indian tribe . . . of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof." Construed in favor of the Indians in *Klamath & Modoc Tribes* v. *Maison*, 139 F.Supp. 634 (D. Ore. 1956).

3. *The Question of Finality.*

At the time this petition was filed, one of the deputy clerks wondered whether the judgment of the Wisconsin Supreme Court was "final," in that none of the petitioners had been sentenced yet. We are familiar with the finality rule, and concede it could be argued that the judgment below will not be final until sentences have been passed (though as we explain below, we believe the sounder view is to hold the judgment final). If this Court holds the judgment non-final petitioners would appear for sentencing (they have already been tried, see below), would obtain a supersedeas or other bond, would take a pro forma appeal to the Wisconsin Supreme Court on the issue already decided against them, and then file a new petition for certiorari in this Court.

We hope, however, that the Court will concede finality in this case, as it has a number of others where the argument against finality is merely technical (the federal and only contested issue having clearly been finally determined) and where the underlying purposes of the finality rule are not offended. We note that the State of Wisconsin, Respondent, has raised no question of finality.

The facts are that the only disputed issue ever in the case, whether as a matter of federal law Wisconsin hunting regulations apply to the Menominee Indians on their reservation, has unquestionably been finally disposed of by the Wisconsin Supreme Court. Nothing further remains for that court. Petitioners have been tried, and the trial court found on the evidence that they would be guilty but for the question of law at bar.[15] Hence nothing remains for the trial court except to pronounce sentence; a single, separate ministerial task which if it gives rise to an appealable issue at all would not give rise to a federal one.[16]

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[15] See colloquy at R. 134-135, and finding at R. 121.

[16] Cf. *Radio Station WOW* v. *Johnson*, 326 U.S. 120, 127 (1945): ". . . the accounting which remains to be taken could not remotely give rise to a federal question."

Stern & Gressman[17] say that the philosophy underlying the requirement of finality is the—

> " . . . harmonious relationships of a federal-state character. They [the finality rules] are designed so that the Court can avoid piecemeal interference with state court proceedings and can refrain from asserting its jurisdiction until a controversy in the state court shall have been finally resolved."

Our case satisfies this policy. The state has spoken on the only disputed issue in the case, and will not speak again. Petitioners' guilt has been tried and established. Nothing remains but the ministerial aftermath, the sentencing.

We see no essential difference between the status of our case, and, for example *Radio Station WOW* v. *Johnson*,[18] where this Court held final a judgment of the Nebraska Supreme Court, even though that judgment contemplated further proceedings for an accounting.[19]

In *Clark* v. *Williard*,[20] the trial court held that certain creditors did not have preferred claims against a dissolved corporation. The Montana Supreme Court reversed, holding that these creditors did have preferred claims, and remanded for further proceedings. This Court held the judgment final because the question of the creditors' preference had been finally disposed of, and "nothing was left to the discretion of the trial court in respect of the

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[17] Stern & Gressman; Supreme Court Practice (3d Ed. 1962) at p. 74; generally, see also Robertson & Kirkham, Jurisdiction of the Supreme Court §§ 23-42 (1936).

[18] *Radio Station WOW* v. *Johnson*, 326 U.S. 120, 124 (1945).

[19] See also *Forgay* v. *Conrad*, 47 U.S. (6 How.) 201 (1848); *Carondelet Canal Co.* v. *Louisiana*, 233 U.S. 362 (1914).

[20] 292 U.S. 112 (1934).

priority of the execution or of the respondents' rights thereunder." (p. 118)

In *Brown Shoe Co.* v. *United States*,[21] this Court held final a federal antitrust order of divestiture, even though the details of the divestiture order had not yet been determined.

In *Johnson* v. *Muelberger*,[22] this Court held final a judgment of the New York Court of Appeals reversing and remanding for trial a lower court decision that a foreign state divorce decree was not subject to collateral attack.

In *Pope* v. *Atlantic Coast Line R. Co.*,[23] this Court held final a judgment of the Georgia Supreme Court reversing a lower court decision which had upheld a demurrer. In other words, when the case came to this Court, the case had not even been tried. The petitioner-defendant there conceded that the issue decided against him by the Georgia Supreme Court was his only defense, and this Court held the ruling final. Comparably, we make the same concession, i.e. that the issue at bar here is the only controlling one.

Petitioners in a case such as this have little choice but to seek review as they have. If they wait until after sentencing to seek review, they face the possible argument that the earlier judgment of the state supreme court was the final judgment and that the time for review of the key question has expired.[24] As Stern & Gressman advise,[25]

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[21] 370 U.S. 294 (1962).

[22] 340 U.S. 581, 583 (1951).

[23] 345 U.S. 379 (1953).

[24] See *Rio Grande Western R. Co.* v. *Stringham*, 239 U.S. 44 (1915); cf. *Dickinson* v. *Petroleum Corp.*, 338 U.S. 507 (1950).

[25] Stern & Gressman, p. 80.

". . . it is best to seek review of the first judgment whenever its finality is a reasonable possibility . . . ."

Respectfully submitted,

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